

**NO. 02-21-00364-CV**

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Court of Appeals for the Second District of Texas  
Fort Worth, Texas

FILED IN  
2nd COURT OF APPEALS  
FORT WORTH, TEXAS

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Texas Health Huguley, Inc., d/b/a Texas Health Huguley Hospital Ft. Worth South;  
Dr. Jason A. Seiden; John Does #1-5; Jane Roes #1-5, Clerk  
Appellants,

v.

Erin Jones, Individually and as Legal Representative and Next Friend of Jason  
Jones,  
Appellees.

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On Accelerated Interlocutory Appeal from the 342<sup>nd</sup> District Court, Tarrant  
County, Texas, Cause No. 342-329996-21  
Honorable Kimberly Fitzpatrick, Presiding Judge

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**BRIEF OF APPELLANTS**

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Jason Seiden, M.D.;  
John Does #1-5; Jane Roes #1-5**

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### **Trial Court:**

**342nd Judicial District Court  
Tarrant County, Texas**

Hon. Kimberly Fitzpatrick  
Tom Vandergriff Civil Courts Building  
100 North Calhoun Street  
Fort Worth, Texas 76196

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## STATEMENT OF THE CASE<sup>1</sup>

*Nature of the Case:* Appellees filed a Petition and Application for Temporary Restraining Order and Temporary Injunction, seeking injunctive relief against Appellants to compel the administration of Ivermectin. CR 6, 14, 123.

*Trial Court:* Honorable Kimberly Fitzpatrick, Presiding Judge, 342nd Judicial District Court, Tarrant County, Texas.<sup>2</sup>

*Trial Court Disposition:* The court granted Appellees' Application for Temporary Injunction. CR 264. App. 1. After the entry of the order granting the temporary injunction, this interlocutory appeal was filed. CR 264, 272. Texas Civil Practice & Remedies Code § 51.014(a)(4).

*Appellate Court:* This Court granted Appellants' emergency motion for stay and set an expedited briefing schedule.

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<sup>1</sup> The Clerk's Record consists of one volume which will be referred to as "CR". The Reporter's Record consists of four volumes which will be referred to as "RR" with the first number referring to the volume and the second number referring to the page or exhibit number. The Exhibits are contained in volume 4 of the Reporter's Record.

<sup>2</sup> This case was initially filed in the 323th District Court. CR 6. It was then transferred and assigned to the 48<sup>th</sup> District Court CR 62, 63. Appellees objected and the case was then assigned to the 342<sup>nd</sup> District Court. CR 90, 136.

## **ISSUE PRESENTED**

Did the trial court abuse its discretion in granting Appellees' temporary injunction when (1) Appellees have not asserted a legally recognizable cause of action and (2) the order exceeds the scope of permissible temporary injunctions?

## STATEMENT OF FACTS

On October 26, 2021, Erin Jones, on behalf of herself and her husband, Jason Jones, a patient at Texas Health Huguley, sued Appellants under the Declaratory Judgments Act to force Appellants to administer Ivermectin to Mr. Jones. CR 6-21. Jones' application for injunctive relief was supported by her own verification and an unsworn prescription from Mary Talley Bowden, M.D., a Houston otolaryngologist. CR 14-20. The same day the lawsuit was filed, the 323rd Family District Court issued an Order Granting Jones' Application for Temporary Restraining Order at **7:54 a.m.** (the "TRO"). CR 21. Appellants filed an emergency motion to dissolve the TRO and sought mandamus relief in this Court. CR 34, 67, 69. The 323<sup>rd</sup> District Court, sua sponte, transferred the case to another civil district court and Appellees ultimately agreed to dissolve the TRO. CR 62, 63, 65.

The case was ultimately transferred to the 342nd District Court. CR 136. The trial court heard Appellees' application for temporary injunction via zoom on November 1 and 2. RR Volumes 1-4.

The evidence at the temporary injunction hearing was as follows:

Mrs. Jones testified that Mr. Jones was diagnosed with COVID-19 on September 23, hospitalized on September 28, and then placed on a ventilator on October 7. RR 2 p. 22, ll. 9-18. Mr. Jones was initially hospitalized at Harris Southwest, where he refused the COVID protocol of Remdesivir, and he discharged



from the hospital against medical advice. RR 2 p. 28, ll. 12-25. Mr. Jones did not get along with his physician at Harris Southwest because “they were pushing [the COVID protocol] and he didn’t want it.” RR 2 p. 29, ll. 20-24. Mr. Jones was later transported to Huguley Hospital by ambulance on September 28, 2021 and then placed on a ventilator on October 7, 2021. RR 2 p. 22, ll. 9-18, p. 29, ll. 17-19. Mr. Jones refused Remdesivir, as well as monoclonal antibody therapy, at Huguley Hospital as well. RR 2 p. 31, ll. 15-19.

Mrs. Jones testified that her husband’s condition had not improved. RR 2 p. 23, ll. 2-8. Mrs. Jones asked the hospital to administer Ivermectin to Mr. Jones and they declined. RR 2 p. 25, ll. 9-11. Before hospitalization, Mr. Jones had asked his primary care provider to prescribe him Ivermectin and it refused. RR 2 p. 34, ll. 23-25. Mrs. Jones then found Dr. Bowden online and she prescribed Ivermectin after a telehealth visit with Mrs. Jones. RR 2 p. 35, ll. 20-25, p. 36, ll. 1-21. Dr. Bowden did not review Mr. Jones’s records or visit with Mr. Jones prior to administering the prescription. RR 3 p. 37, ll. 1-25.

Dr. Jason Seiden, Mr. Jones’s treating physician, board certified in pulmonary medical, critical care medicine, and hospice and palliative care medicine, Assistant Chief of Staff and Medical Director of the Medical Intensive Care Unit at Huguley Hospital, testified about Mr. Jones’s treatment and the COVID protocols at the hospital. RR 2 pp. 48, ll. 9-25; p. 49, ll. 1-8. Ivermectin is not part of Huguley

Hospital's COVID protocol. RR 2 p. 50, ll. 18-25. Dr. Seiden testified that there is not a single authoritative body that recommends Ivermectin at any stage in the treatment of COVID-19. RR 2 p. 51, ll. 3-11. Ivermectin is not approved or recommended by any governing agency for the treatment of COVID-19. RR 2 p. 51, ll. 12-19.

Dr. Seiden clarified that Mr. Jones was not healthy when he was first admitted to the hospital; he had a stroke at the age of 42, untreated sleep apnea and obesity, hypertension and was a former smoker. RR 2 p. 54, ll. 1-6. Mr. Jones was offered the entire recommended protocol for COVID-19 and he refused most of that protocol. RR 2 p. 54, ll. 9-20. Mr. Jones did not ask Dr. Seiden for Ivermectin. RR 2 p. 55, ll. 1-6. The first time Dr. Seiden was asked for Ivermectin was through this legal action. RR 2 p. 55, ll. 1-6. Dr. Seiden has not prescribed Ivermectin to Mr. Jones because it is on an FDA warning not to be used in the treatment of COVID-19 infection. RR 2 p. 58, ll. 9-18. In addition, one of the purported uses of Ivermectin is to prevent further viral replication or reproduction in the cells but because Mr. Jones is no longer being treated for COVID-19, rather the damage caused by COVID, he no longer requires treatment for the virus itself. RR 2 p. 60, ll. 8-18. Thus, even if Ivermectin were approved, there is no clinical reason to administer it to Mr. Jones. RR 2 p. 60, ll. 19-22.

Dr. Bowden is an otolaryngologist, who currently works in private practice. RR 3 p. 12, l. 22. She acknowledged in her testimony that she had only spoken to Mrs. Jones and had not examined Mr. Jones or requested or reviewed his medical records. RR 3 p. 19, ll. 2, 11-12. She was also surprised to learn that Mr. Jones had not undergone a tracheostomy, which was contrary to what Mrs. Jones relayed to her. RR 3 p. 21 ll. 5-9. Dr. Bowden was also unaware of Mr. Jones' true medical history, which she asserted did not matter. RR 3 p. 22, ll. 4-10. Mr. Jones was prescribed Calcitriol, Melatonin, Fluvoxamine, Atorvastatin, and Cyproheptadine by Dr. Bowden, in addition to Ivermectin. RR 3 p. 25, ll. 1-14. Dr. Bowden did not remember prescribing Cyproheptadine but stated that she prescribed everything on FLCC's protocol for patients in the hospital, which she relied on rather than her independent medical judgment. RR 3 p. 25, ll. 18-20. She indicated that she did not have a concern about the potential side effects of the prescribed medicines. RR 3 p. 27, ll. 20-21.

Dr. Bowden indicated that she would go to "Dallas," to administer the Ivermectin and manage any clinical complications. RR 2 p. 29, ll. 6-15. However, she admitted that she had not applied for privileges at Texas Health Huguley, nor did she have an advanced practice nurse who could operate under her medical license. RR 3 p. 13, ll. 23-25, p. 32, ll. 6-8.

Jones also called Senator Bob Hall to testify about the “Medical Freedom Act.” RR 4, Ex.9, p. 36, ll. 16-25. Although Mr. Hall testified that the Medical Freedom Act allowed patients to try experimental medications, the law could not be cited, nor did the Court take judicial notice of the purported statute. RR 3 p. 40, ll. 5-11.

Tandra Cobern, the hospital’s Director of Medical Staff Services, testified to the credentialing process for a physician to gain temporary privileges, which mirrors that required by the CMS Conditions of Participation and Joint Commission standards. RR 3 p. 42, ll. 5-18. There are also limitations because Mr. Jones is in the MICU, a closed unit. RR 3 p. 42-43, ll. 22-25, 1-6. Ms. Cobern further testified that in the event even temporary privileges are granted, the practitioner’s privileges are limited to the scope of their medical competence. RR 3 p. 43, ll. 1-12.

Appellants filed a brief in opposition to Appellees’ requested injunction. CR 148. After a telephone conference with the Court on November 5, 2021, both parties filed competing letter briefs. CR 171, 186.

On November 8, the trial court issued a temporary injunction and ordered Appellants to grant temporary privileges to Dr. Bowden so that she could administer Ivermectin to Mr. Jones. CR 264. Appellees were ordered to provide a signed release, waiving the rights of Mr. Jones, but executed by Mrs. Jones, “releasing Defendants, Defendants' employees, agents, officers, physicians, nurses, executors,

assigns, or any third party acting on Defendants' behalf of any and all liability related to Mr. Jason Jones and the administration of Ivermectin by Dr. Bowden.” CR 268.

The trial court issued findings of fact in its injunctive order along with twelve conclusions of law. CR 2640-65. None of the conclusions mention the underlying cause of action, instead, the conclusions of law state:

2. There is sufficient evidence that Jason Jones' medical condition and health continues to decline as he has been on a ventilator, in a medically induced coma for 30 days, and imminent harm and irreparable injury in this matter will include death which by its nature is an irreparable loss.
3. Plaintiff has no adequate remedy at law, and Plaintiff has demonstrated a likelihood of success and a balance of equities favors the granting of injunctive relief in order to preserve the life of Jason Jones. CR 265-66.

As it relates to the federal and state statutes regarding credentialing, the conclusions of law state the following;

4. The Court takes judicial notice that the Centers for Medicare and Medicaid Services in 2020 waived requirements under 42 CFR §482.22(a)(1)-(4) for Texas Hospitals regarding the credentialing and privileging process due to covid-19. Further, the Centers for Medicare and Medicaid Services reaffirmed said waiver in May, 2021, allowing new physicians to be able to practice in a hospital before being credentialed and granted privileges. Pursuant to said waiver, no Federal or State would be violated by allowing Dr. Bowden to administer Ivermectin to Jason Jones.
5. Furthermore, no Federal or State law would be violated as Medicaid and/or Medicare does not apply to Jason Jones. Jason Jones' private medical insurance is covering his hospitalization and medical costs, and no claim for

reimbursement would be made to Texas or the Federal Government. CR 266.

The remaining conclusions of law address the Texas Health and Safety Code, Chapter 489, regarding terminal patients' use of an investigational drug, the statutes that allow Mrs. Jones to provide informed consent, and the statutory language purportedly "granting immunity" to hospitals for the treatment of patient with Ivermectin. CR 266-67.

The order also set a "Trial and Hearing" on a permanent injunction on August 8, 2022 at 8:30 a.m. CR 269. This appeal followed, along with Appellants' request for emergency relief in the form of a stay.

## **SUMMARY OF THE ARGUMENT**

The trial court abused its discretion when it issued the temporary injunction. Appellees failed to establish by preponderant evidence that there is a valid underlying cause of action for the temporary injunction and that they have probable right to relief. Likewise, the temporary injunction does not preserve the status quo; rather, it requires Appellants to violate state and federal law. Finally, the relief awarded in the temporary injunction exceeds the authorized purpose of keeping the status quo. In fact, the relief awarded—ordering temporary privileges to Dr. Bowden—is wholly unrelated to Appellees’ cause of action for declaratory judgment. And, the testimony of Appellees’ sole medical witness upon which the relief awarded is based, was conclusory and without foundation. The temporary injunction order should be reversed.

## ARGUMENT

### **I. The trial court abused its discretion in granting the temporary injunction.**

The trial court abused its discretion in issuing a temporary injunction requiring Appellants, who are not the credentialing authority at Huguley Hospital, to temporarily grant privileges to Dr. Bowden, an otolaryngologist without intensive care education, training, or experience, for the sole purpose of prescribing and administering Ivermectin to Mr. Jones at Huguley Hospital. Appellees have not alleged a valid cause of action upon which injunctive relief is proper. In addition, the trial court erred by awarding relief on an ultimate issue in the case, rather than to preserve the status quo, and which relief is not related to Appellees' cause of action or supported by competent evidence.

#### **A. The trial court erroneously applied the law to an undisputed set of facts.**

A court of appeals may reverse a temporary injunction order only when the trial court abuses its discretion in issuing the injunction. *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002). If a court applies the law erroneously to undisputed facts, the court has abused its discretion. *Tel. Equip. Network, Inc. v. TA/Westchase Place, Ltd.*, 80 S.W.3d 601, 607 (Tex. App.-Houston [1st Dist.] 2002, no pet.). A trial court also abuses its discretion when it issues an injunction that orders an illegal act, even when done in the name of preserving the status quo. *See City of Friendswood v. Registered Nurse Care Home*, 965 S.W.2d 705, 708 (Tex. App.—



Houston [1<sup>st</sup> Dist.] 1998, no pet.) (vacating temporary injunction order granted in favor of plaintiffs/appellees because trial court abused discretion by issuing injunction that preserved status quo by allowing plaintiffs to continue operating facilities under conditions violating law); *see also DeNoie v. Bd. of Regents of Univ. of Tex. Sys.*, 609 S.W.2d 601, 603 (Tex. Civ. App.-Austin 1980, no writ) (“Status quo can never be a course of conduct which is a prima facie violation of law.”).

**B. The trial court abused its discretion by issuing a temporary order that was not based on a valid underlying cause of action.**

To prevail on a request for injunctive relief, a plaintiff must plead and prove three specific elements: (1) a cause of action against the defendant; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim.” *Butnaru*, 84 S.W.3d at 204. A trial court abuses its discretion in ordering a temporary injunction, when there has been no showing of a valid cause of action. *Argyle Indep. Sch. Dist. ex rel. Bd. of Trustees v. Wolf*, 234 S.W.3d 229, 238 (Tex. App.—Fort Worth 2007, no pet.).

Here, Jones seeks a declaratory judgment that Appellants comply with the wishes and directives of Mrs. Jones and follow Dr. Bowden’s order and prescription to administer the protocol contained in her prescription. CR. 127, 129. Jones did not assert any tort or contract claim against Appellants.

A trial court only has jurisdiction over a declaratory judgment claim if it is a claim for which the Uniform Declaratory Judgments Act applies. Tex. Civ. Prac. &

Rem. Code § 37.002, 37.003. Under the Uniform Declaratory Judgments Act, Chapter 37 of the Texas Civil Practice and Remedies Code, the only subject matter for relief permitted is that of “[a] person interested under a deed, will, written contract, or other writings constituting a contract or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise.” Tex. Civ. Prac. & Rem. Code § 37.004(a).

In this case, Jones has not pleaded any valid interest under a deed, will, written contract, or other writing constituting a contract, nor have they pleaded that their rights are affected by any statute, municipal ordinance, contract, or franchise. Instead, Jones seeks a declaration determining the rights of the parties under a nebulously-referenced “express and/or implied” contract and the alleged denial of Mr. Jones’s “legal right to make rational treatment decisions and choices, individually and through” Mrs. Jones. CR 128.

There is simply no cause of action, declaratory or otherwise, against health care providers for failure to administer a medication that is not clinically indicated and outside of the standard of care. Because Jones asserts no valid cause of action, there cannot be a probable right to relief to warrant injunctive relief.

**C. The trial court abused its discretion by issuing a temporary order that compels Appellants to violate federal and state statutes, thus not preserving the status quo.**

As it stands, the trial court has substituted the professional medical judgment of a hospital, all of its employed health care providers, and the physicians attending to the care of Mr. Jones for its own, based on nothing other than a purported “prescription” from an unqualified physician that is not credentialed at Texas Health Huguley. Moreover, the trial court’s order concerns a third-party credentialing committee over which Appellants have no control.

**1. Texas law allows Texas Health Huguley to regulate physician privileges through its credentialing committee.**

There is no dispute that federal law requires hospitals to form medical staffs that are governed by bylaws and rules and regulations, the membership of which are determined by its members and credentialing committees. Texas Health Huguley’s Medical Staff Services Director, Tandra Cobern, testified that the Conditions of Participation are mirrored by the Bylaw and Rules of Regulations of the hospital, as well as standards promulgated by The Joint Commission, the independent non-profit organization that accredits and certifies more than 22,000 health care organizations and programs in the United States, and that is the oldest and largest standards-setting accrediting body in health care. RR 3, p. 42. Texas law mirrors the Conditions of Participation. *Id.*

In adopting rules for hospitals, “conditions of participation for certification under Title XVIII of the Social Security Act (42 U.S.C. § 1395 et seq.) and the standards of The Joint Commission are used “to achieve consistency with those conditions and standards.” Tex. Health & Safety Code § 241.026(b). A hospital’s license may be suspended or revoked also for failing to comply with any provision of Texas Health and Safety Code Chapters 241 or 311. 25 T.A.C. § 133.121(1)(A). CR. 171-173.

25 Texas Administrative Code § 133.41(f) outlines the rules and responsibilities of the “Governing body” of a hospital, which is “responsible for the organization, management, control, and operation of the hospital, including appointment of the medical staff.” 25 T.A.C. § 133.41(f)(1). The governing body must be formally organized in accordance with written bylaws. *Id.* at (f)(2). *The medical staff of a hospital must have bylaws, rules, and regulations which are implemented and enforced.* *Id.* at (f)(4)(A) (emphasis added); *see also* RR 3, Ex. 10, Exhibits 9 and 10 of the hearing record, Texas Health Huguley’s Bylaws and Rules and Regulations for the Medical Staff, respectively. Further, the governing body “shall determine, in accordance with state law and with the advice of medical staff, which categories of practitioners are eligible candidates for appointment to the medical staff.” 25 T.A.C. § 133.41(f)(4)(F). “The medical staff shall examine credentials of candidates for medical staff membership and make recommendations

to the governing body on the appointment of the candidate.” *Id.* at (k)(1)(B); *see also* Tex. Health & Safety Code § 241.101. Moreover, the governing body “shall be responsible for and ensure that any policies and procedures adopted by the governing body to implement the requirements of this chapter shall be implemented and enforced.” 25 T.A.C. § 133.41(f)(4)(F)(I) (emphasis added). CR. 171-173.

**2. Only physicians with hospital privileges may practice at a particular hospital.**

In order to treat a hospital’s patient, a physician must have privileges at that hospital. “A hospital’s bylaw requirements for staff privileges may require a physician...to document the person’s current clinical competency and professional training and experience in the medical procedures for which privileges are requested.” *Id.* at (f)(4)(F)(IV). Texas law requires that a credentials committee review an applicant’s request for privileges. “A hospital’s credentials committee shall act expeditiously and without unnecessary delay when a licensed physician...submits a completed application for medical staff membership or privileges.” *Id.* at (f)(4)(F)(VIII). A hospital’s medical staff “shall adopt, implement, and enforce bylaws, rules, and regulations to carry out its responsibilities.” *Id.* at (k)(3). Medical staff bylaws “shall describe the qualifications to be met by a candidate in order for the medical staff to recommend that the candidate be appointed by the governing body.” *Id.* at (k)(3)(D). Bylaws should also “include criteria for determining the privileges to be granted and a

procedure for applying the criteria to individuals requesting privileges.” *Id.* at (k)(3)(E). CR. 171-173.

**3. Texas law limits the granting of privileges to a physician to treatments within that provider’s scope of practice.**

*Physicians are not permitted to perform “acts that are beyond the scope of the respective license held.”* Tex. Health & Safety Code § 241.102(a) (emphasis added). Physicians are not entitled to membership or privileges on a medical staff. *Id.* at (d). All physicians must recognize the limitations of their ability and shall not offer services outside the provider’s scope of practice or use techniques that exceed their professional competency. 25 T.A.C. § 448.202. Providers “shall provide adequate and appropriate services consistent with best practices and industry standards.” 25 T.A.C. § 448.201. CR. 171-173.

With respect to the administration of medications, hospitals may only prepare and administer drugs and biologicals “in accordance with federal and state laws, the orders of the individuals granted privileges by the medical staff, and accepted standards of practice.” *Id.* at (o)(4) (emphasis added). The prescription and administration of medications that are non-therapeutic violates the Texas Medical Practice Act. Tex. Occ. Code § 164.053(a)(5). Similar restrictions govern the practice of nurses and pharmacists. 25 T.A.C. § 133.41(q); *see also* 25 T.A.C. § 448.1001(b) (“Prescription medication shall be used only for therapeutic and

medical purposes and shall be administered as prescribed by an appropriately licensed professional”).

**4. Requiring emergency privileges so Dr. Bowden can treat Mr. Jones violates federal and state law.**

Texas Health Huguley’s Bylaws (RR 3, Ex. 9, § 4.2.2.1), in accordance with federal and state law as shown above, outline the members and duties of its Credentials Committee. CR. 171-173. Note that the voting members of the Committee are physicians on the Medical Staff. *Id.* Texas Health Huguley’s physicians are not employed by the hospital, and as such are not under the hospital’s control. The Credentials Committee reviews all Applications and Requests for Clinical Privileges and requests for advancement and making recommendations to the Medical Executive Committee regarding such Application and requests.” *Id.* at § 4.2.2.2.1.

Texas Health Huguley’s Medical Staff’s members must “[a]bide by the Medical Staff Bylaws, Rules and Regulations, the Hospital’s policies and procedures, regulatory requirements (*i.e.* the above-referenced Texas Administrative Code provisions and the CMS Conditions of Participation), and the professional code of ethics of the Member’s profession. *Id.* at § 5.4.1. Members of the Medical Staff must be competent. *Id.* at § 5.5.2.

To be granted temporary privileges, the President of the Medical Staff, Chair of the Credentials Committee, and the Department Chair must endorse the Applicant, and an Applicant's request "may be granted only when there is an important patient care, treatment or service need." *Id.* at § 6.12.2.

Jones cannot show nor has she shown that Dr. Bowden, an otolaryngologist without intensive care experience, is qualified to provide the treatment requested. There is no need for an otolaryngologist to be granted temporary privileges at Texas Health Huguley, especially when considering that the patient is critically-ill in the Intensive Care Unit, a closed unit of the hospital limited to "intensivists" such as Dr. Seiden.

**5. There is no exception which permits the order of emergency privileges.**

Jones argues that there is an exception to the formal credentialing process that permits Dr. Bowden's credentials because of a pandemic-related waiver under federal law. This conclusion of law, upon which the temporary injunction is based, is without support in law or in this record. Jones never established that this exception applies to Texas Health Huguley. First, the CMS waiver applies only to federal law when the hospital is under emergency protocols. Here, there has been no proof that Texas Huguley is under emergency protocols; rather, Texas Huguley is fully-staffed



and not in need of an otolaryngologist (notwithstanding the fact that Mr. Jones is also not in need of otolaryngology care).

**D. The temporary injunction interferes with the independent medical judgment of health care providers.**

Texas courts have recognized that mandatory injunctions are tenuous when what is interfered with is the independent medical judgment of health care providers. Courts have “disavowed any attempt to second-guess the propriety or adequacy of a particular course of treatment” because it is “a question of sound professional judgment.” *Muniz v. Texas Dep’t of Crim. Just.*, 2008 WL 2764518 at \*3 (Tex. App.—Corpus Christi Jul. 17, 2008, no pet.) (rejecting request for preliminary injunction ordering defendants to provide patient operation—“Courts should not intervene upon allegations of mere negligence, mistake, or difference of opinion”). Federal courts have also held that “judges are not ‘better qualified than appropriate professionals’ to make decisions relating to the physical and mental health of patients and that, to the extent possible, ‘interference by the federal judiciary with the internal operations of...institutions...should be “minimized.”” *Costa v. Bazron*, 464 F.Supp. 3d 132, 141 (D.D.C. 2020) (quoting *Youngberg v. Romeo*, 457 U.S. 307, 322-23 (1982)); *See also Youngberg*, 457 U.S. at 323 (“[W]e emphasize that courts must show deference to the judgment exercised by a qualified professional”— “[T]here certainly is no reason to think that judges or juries are better qualified than appropriate professionals in making such decisions.”); *Bowring v. Godwin*, 551 F.2d

44, 48 (4th Cir. 1977) (“[W]e disavow any attempt to second-guess the propriety or adequacy of a particular course of treatment. Along with other aspects of health care, this remains a question of sound professional judgment. The courts will not intervene upon allegations of mere negligence, mistake or difference of opinion.”).

Here, the temporary injunction overrides proper deference to the independent, professional, and clinical judgment of the patient’s health care providers which renders it erroneous as a matter of law. The Court’s Order requires the hospital to circumvent federal and state law, The Joint Commission standards, and the hospital’s bylaws and rules and regulations on the vetting of credentialed physicians by awarding privileges to a physician that it believes to be unqualified to care for Mr. Jones and for the sole purpose to administer a medication that Mr. Jones’ current providers believe to not only be unindicated but also potentially harmful. This is dangerous precedent.

**E. The temporary injunction exceeds the authorized purpose of keeping the status quo.**

In granting or refusing a temporary injunction, the trial court is vested with broad discretion to determine only one issue: whether the party requesting temporary relief is entitled to preservation of the status quo of the subject matter pending a trial on the merits. *Tex. Dep’t of Public Safety v. Martin*, 882 S.W.2d 476 (Tex. App.—Beaumont 1994, no writ). An order granting injunctive relief that does not set forth the act to be restrained with sufficient specificity is void. *Hoist Liftruck Mfg., Inc v.*

*Carruth-Doggett, Inc.*, 485 S.W.3d 120, 123 (Tex. App.—Houston [14th Dist.] 2016, no pet.). Here, the order granting the temporary injunction cannot possibly meet this standard—it does more than merely keep the status quo, it orders Appellants to take action that is not in any way related to the claim for declaratory relief. And, the action being ordered has nothing to do with keeping the status quo pending a trial on the merits. Rather, it awards Jones relief on the ultimate issue in the case without affording Appellants the due process right to present complete evidence and arguments in their defense.

Keeping the status quo in this case is properly characterized as keeping the ultimate subject of the litigation, Mr. Jones, alive. Appellants have gone through extraordinary efforts to do so—Dr. Seiden testified that he saved Mr. Jones’ life twice just in the week leading up to the temporary injunction hearing by emergently inserting tubes in his chest cavity to clear trapped air caused by multiple collapsed lungs. Obviously, this case presents profoundly regrettable circumstances, as the trial court itself remarked during the temporary injunction hearing, but the law must still be followed.

**F. The relief awarded by the temporary injunction is not related to Appellee’s supposed cause of action and was not necessary to prevent any alleged harm to Mr. Jones during the continuation of this lawsuit.**

Jones’s sole claim in this case is for declaratory judgment to force Appellants to administer Ivermectin to Mr. Jones. CR 127-29. The trial court ordered

Appellants to grant privileges (through their third-party credentialing committee) to a physician who would never be awarded such privileges absent this lawsuit. However, Appellees never proved that the granting of privileges to Dr. Bowden was necessary to preserve Mr. Jones's condition. In fact, the record is devoid of any competent evidence linking Appellees' insistence that Mr. Jones be given Ivermectin to the preservation of Mr. Jones's health.

The only evidence addressing Mr. Jones's current condition was Dr. Seiden's testimony that Mr. Jones is no longer being treated for COVID-19, rather the damage caused by COVID, and he no longer requires treatment for the virus itself. RR 2 p. 60, ll. 8-18. All of Dr. Bowden's testimony—to the extent it is competent evidence—is that she has treated over 2,000 patients with COVID-19 with Ivermectin and that she believed it was safe. RR. 3, p. 9, ll. 9-11. But, because Dr. Bowden had never personally seen Mr. Jones, she did not testify whether Ivermectin was clinically indicated since he was no longer being treated for COVID-19. RR 2 p. 19, ll. 2, 11-12. Dr. Bowden's conclusory statements about the effectiveness of Ivermectin—coupled with the fact that she has not met Mr. Jones, reviewed his medical records, or spoken to his current providers, renders her opinions of little to no legal significance. *See Kindred v. Con/Chem, Inc.*, 650 S.W.2d 61, 63 (Tex. 1983) (holding that conclusory evidence is “no” evidence).

## CONCLUSION AND PRAYER

As heartbreaking as Mr. Jones's condition is, there is simply no legal authority for the temporary injunction issued in this case. Appellees have alleged no valid cause of action for which they have a probable right to recovery and the temporary injunction grants relief well outside of permissible injunctive relief. For the reasons stated above, Appellants respectfully request that this Court reverse the trial court's interlocutory order granting temporary injunction.

Respectfully submitted,

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ATTORNEYS FOR APPELLANTS

## CERTIFICATE OF COMPLIANCE

This document complies with the typeface requirements of Tex. R. App. P. 9.4(e) because it has been prepared in a conventional typeface no smaller than 14-point for text and 12-point for footnotes. This document also complies with the word-count limitations of Tex. R. App. P. 9.4(i), if applicable, because it contains 4875 words, excluding any parts exempted by Tex. R. App. P. 9.4(i)(1).

/s/ Joshua D. Ross

Joshua D. Ross

Attorney for Appellants

## CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Brief has been served upon all counsel of record as noted on this the 12th day of November, 2021, via electronic service.

/s/ Joshua D. Ross

Joshua D. Ross

Attorney for Appellants

## **APPENDIX**

**ERIN JONES, Individually and as  
Legal Representative and  
Next Friend of Jason Jones**

**V.**

### Defendants.



## 342<sup>nd</sup> JUDICIAL DISTRICT

1



continuing to decline.

5. Defendants have treated Jason Jones with their Covid-19 protocol and refuse to deviate from their protocol and administer an alternative medical treatment with the use of the drug ivermectin, despite the fact that their Covid-19 protocol has not improved his condition.

6. Dr. Mary Talley Bowden, M.D. has prescribed ivermectin for Jason Jones. Dr. Bowden is a Board-Certified Physician duly licensed to practice medicine under the laws of the State of Texas.

7. Dr. Bowden testified that she has successfully treated hundreds of covid patients with ivermectin and that Jason Jones would have a good chance of survival if treated with ivermectin. She further testified that ivermectin is safe and effective for covid patients, and that off-label use of approved FDA drugs, including ivermectin, is within the standard of care.

8. Plaintiff, Erin Jones, in her capacity as surrogate decision-maker, has consented to Dr. Bowden treating her husband, Jason Jones, with ivermectin.

9. Plaintiff, Erin Jones, testified that her husband, Jason Jones, requested to be treated with ivermectin prior to being placed on a ventilator.

10. Plaintiff, Erie Jones, testified that she is willing to execute an informed consent as well as a release and waiver, to the Defendant in regard to Jason Jones' treatment with ivermectin.

### **CONCLUSIONS OF LAW**

1. Under Texas law, to determine whether the remedy of injunctive relief is warranted, Courts consider several factors.

2. There is sufficient evidence that Jason Jones' medical condition and health continues to decline as he has been on a ventilator, in a medically induced coma for 30 days, and imminent harm and irreparable injury in this matter will include death which by its nature is an irreparable loss.

3. Plaintiff has no adequate remedy at law, and Plaintiff has demonstrated a likelihood of success and a balance of equities favors the granting of injunctive relief in order to preserve the life of Jason Jones.

4. The Court takes judicial notice that the Centers for Medicare and Medicaid Services in 2020 waived requirements under 42 CFR §482.22(a)(1)-(4) for Texas Hospitals regarding the credentialing and privileging process due to covid-19. Further, the Centers for Medicare and Medicaid Services reaffirmed said waiver in May, 2021, allowing new physicians to be able to practice in a hospital before being credentialed and granted privileges. Pursuant to said waiver, no Federal or State would be violated by allowing Dr. Bowden to administer ivermectin to Jason Jones.

5. Furthermore, no Federal or State law would be violated as Medicaid and/or Medicare does not apply to Jason Jones. Jason Jones' private medical insurance is covering his hospitalization and medical costs, and no claim for reimbursement would be made to Texas or the Federal Government.

6. The Court takes judicial notice of the Texas Health and Safety Code, Chapter 489 "Access to Investigational Treatments for Patients with Terminal Illnesses". This law confirms the right of terminal patients to use an investigational drug, such as ivermectin.

7. Texas Health and Safety Code §489.052 further incorporates the doctrine of informed consent; in this case, Erin Jones, may provide informed consent on the patient's behalf.

8. Texas Health and Safety Code §489.054 and §489.151 further grants immunity to the hospital, physicians and providers "for any harm done to the patient resulting from the investigation drug".

9. The Court takes judicial notice of the Texas Health and Safety Code, Chapter 313 "Consent to Medical Treatment Act". §313.002 allows for a Surrogate decision-maker to

consent to medical treatment on behalf of an incapacitated person. §313.004(1) specifically states “the patient’s spouse” may consent to medical treatment on behalf of the patient; in this case, Erin Jones, may consent to medical treatment on behalf of her husband Jason Jones.

10. Further, the Texas Health and Safety Code §313.007 limits liability for hospitals, physicians and staff for the medical treatment consented to under this chapter.

11. The Court takes judicial notice of the Texas Civil Practice & Remedies Code, Chapter 74, §155 “Liability of Physicians, Health Care Providers, and First Responders during Pandemic”. Effective June 14, 2021, the Texas Legislature has conveyed immunity to the hospitals and physicians treating patients suffering from a pandemic disease.

12. Pursuant to Texas Civil Practice & Remedies Code, §74.155, Defendants hereunder are “not liable for an injury, or death arising from care, treatment, or failure to provide care or treatment relating to or impacted by a pandemic disease”.

Having found that Plaintiff met its burden for a Preliminary Injunction,

IT IS HEREBY:

ORDERED, that pending further order of this Court, the Defendants, their agents, and assigns, and any third parties acting on its behalf, upon receipt of this Order, shall grant Dr. Mary Talley Bowden, M.D. and/or her nurse working under her authority, temporary emergency privileges, which shall not be unreasonably delayed or denied, solely to administer Ivermectin to Jason Jones, pursuant to the order and the attached Prescription of Dr. Bowden; and it is further

ORDERED, that Dr. Bowden and/or her nurse working under her authority, is limited solely to the ivermectin portion of her prescription, which shall consist of crushing the ivermectin pills and flushing them into the feeding tube of Jason Jones; and it is further

ORDERED, that Dr. Bowden and/or her nurse working under her authority, is granted access in the ICU at Texas Health Huguley Hospital to Jason Jones for the sole purpose of



administering ivermectin to Jason Jones, and shall further provide notice to the Hospital of when she shall be administering the ivermectin to Jason Jones; and it is further

ORDERED, that Defendants, Texas Health Huguley, Inc., d/b/a Texas Health Huguley Hospital Ft. Worth South, and Dr. Jason A. Sieden, are not required to administer ivermectin to Jason Jones nor are they required to provide the medication for Dr. Bowden; and it is further

ORDERED, upon the completion of the administration of ivermectin to Jason Jones, Dr. Bowden and/or her nurse working under her authority, shall leave the hospital and that all other matters concerning Jason Jones will be under the control and authority of the Defendants; and it is further

ORDERED, that Dr. Bowden shall be available to consult with Jason Jones' hospital physicians regarding treatment of any adverse reaction to the ivermectin; and it is further

ORDERED, that in the event Jason Jones develops a serious adverse reaction to the ivermectin, the Hospital by and through their Physicians, can make the decision to discontinue the use of ivermectin;

At the hearing, Plaintiff agreed, on the record, to release Defendants, Defendants' employees, agents, officers, physicians, nurses, executors, assigns, or any third party acting on Defendants' behalf of any and all liability related to Mr. Jason Jones and the administration of ivermectin by Dr. Bowden:

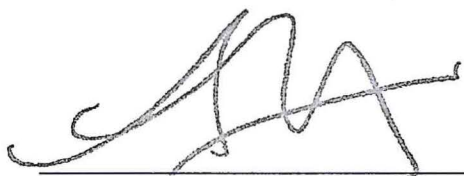
Plaintiff's counsel drafted a proposed release, releasing Defendants, Defendants' employees, agents, officers, physicians, nurses, executors, assigns, or any third party acting on Defendants' behalf of any and all liability related to Mr. Jason Jones and the administration of ivermectin by Dr. Bowden. IT IS THEREFORE ORDERED that Plaintiff shall execute and deliver said release to Defendants prior to the administration of the ivermectin by Dr. Bowden.

ORDERED, that Plaintiff shall pay a cash bond in the amount of \$1.00 to the Clerk of the

Court by November 2, 2021, in connection with the above injunctive order; it is further

ORDERED, that all parties shall appear before the Honorable Kimberly L. Fitzpatrick on the 8 day of August, 2021 at 8:30 a.m. / ~~p.m.~~ for Trial and Hearing on a Permanent Injunction.

Signed on November 8, 2021.

A handwritten signature in dark ink, consisting of stylized, overlapping loops and strokes, positioned above a horizontal line.

Honorable Kimberly L. Fitzpatrick





**BreatheMD**  
OPTIMAL AIRWAY HEALTH

## Prescription Form

Date: 10/22/21. Patient: Jason Jones DOB 12/4/1972

Ivermectin 3mg. Give 21 tablets per NGT qD, Dispense 210 tablets, Refill:2

Calcitriol 0.25mcg per NGT QD, Dispense: #30, Refill:2

Melatonin 12mg per NGT QHS, Dispense: #30, Refill:2

Fluvoxamine 50mg per NGT BID, Dispense #60, Refill:2

Cyproheptadine 8mg per NGT TID, Dispense #90, Refill:2

Zinc 100mg per NGT QD, Dispense #30, Refill: 2

Famotidine 80mg per NGT BID, Dispense #60, Refill 2

Atorvastatin 80mg per NGT QD, Dispense #30, Refill 2

Flutamide 250mg per NGT TID, Dispense #90, Refill 2

Spirolactone 100mg per NGT BID, Dispense #60, Refill 2

Finasteride 10mg per NGT QD, Dispense #30, Refill 2

Nitazoxanide 500mg per NGT BID, Dispense #60, Refill 2

### IV Infusions Recommended:

- Methylprednisolone 80mg IV bolus then 40mg IV BID
- Vitamin C 25mg IV BID x 3 days
- Thiamine 200mg IV BID
- Therapeutic Plasma Exchange

Prescriber:  
Mary Talley Bowden, MD  
Tx license: K9770  
NPI: 1699858282

3600 Kirby Dr. Suite F  
Houston, TX 77098  
713-492-2340

713-206-8988 (ccu)